No. 14,959

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellant,

vs.

MARINE TERMINALS CORP.,
a corporation,
Appellee.

APPELLEE'S PETITION FOR A REHEARING AND ALTERNATIVE MOTION FOR MODIFICATION OF ORDER TO PERMIT RETRIAL OF NEW ISSUES.

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To the Honorable William Healy and Richard H. Chambers, Circuit Judges of the United States Court of Appeals for the Ninth Circuit, and the Honorable Oliver D. Hamlin, District Judge who sat on the Court of Appeals in the Matter:

Comes now the undersigned, your Petitioner and respectfully submits that it has been aggrieved by an opinion of your Honors rendered herein on the 14th day of June, 1956, in the respects hereinafter set forth, and prays for a rehearing of said matter.

GROUNDS OF THIS PETITION.

A. This Honorable Court erred in applying the ruling of the Supreme Court in the case of *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.,* 350 U.S. 124, to the particular facts and pleadings of the case at bar.

B. The doctrine of the *Ryan* case had no applicability to the type of action filed in the case at bar for indemnity based on alleged sole, active and primary negligence on the part of this petitioner.

C. The case at bar was not based on any pleadings of nor under any issues of alleged breach of contract or warranty as was the *Ryan* case.

D. The evidentiary facts, pleadings and issues of the *Ryan* case were entirely foreign and different from the facts, pleadings and issues of the case at bar.

E. That no evidence, findings or consideration had been given or made by the trial judge or counsel on the issues determined in the *Ryan* case on alleged breach of contract or warranties.

F. That justice would require that if the case at bar be determined under the contract provisions and warranties arising out of the contract between the appellant and appellee herein that such issues require supporting pleadings, and that evidence be introduced in a trial on such new issues upon which this Honorable Court has ordered indemnity over.

G. That if the *Ryan* case was applicable to the case at bar that the case should have been remanded to the trial judge for trial on such issues and that this

Honorable Court erred in ordering indemnity over without a trial on such issues.

DISCUSSION OF GROUNDS.

A. PLEADINGS AND ISSUES OF CASE AT BAR.

The indemnity action filed by American President Lines against Marine Terminals Corporation in the case at bar (Tr. p. 3) *were grounded solely on allegations of tortious negligence against the Marine Terminals Corporation* in having its employees "working in a dangerous, unsafe and unseaworthy place due to the imminent danger of said hatchbeams becoming dislodged from its position during cargo handling operations and falling into the hatch" (Tr. p. 4, Par. IV of Complaint.)

It further charged us with "negligently, recklessly and without regard to the imminent peril *to its employees,* commenced cargo operations, etc." (Tr. p. 4, Par. IV of Complaint.) (Our emphasis.)

Nowhere in the Complaint filed in this action is any alleged breach of contract or warranty as to the method of doing our work under the contract, either alleged or mentioned.

The issues were entirely as to *whose negligence* was the greatest.

The Complaint was based on the theory that the American President Lines' negligence was mere unseaworthiness (negligence was later interposed) under the doctrine of liability without fault.

All of the issues, evidence and findings were directed to determine the comparative culpability of the parties to the injured stevedore, *and breach of contract or of express or implied warranties were not the subject of either pleadings, evidence, argument, contention or findings by the trial Court.*

The answer of the defendant in the action goes directly to the question of tortious negligence (Tr. p. 19, Paragraph V) and the defense of compliance with the Longshoremen and Harbor Workers Compensation Act is pleaded as a bar as to defendant's "negligence and carelessness". We were not called upon to answer any charge (upon which your Honors have decided this case) as to alleged breach of contract or warranties. The Complaint does not so allege nor were any amendments offered or made to so allege.

Where were we charged at any time in the pleadings or during the trial with having breached our contract or any warranties of performance?

It was not until Appellant filed their opening brief that such contention was first raised, under the *Ryan* case, which we felt and still feel was decided on different facts and pleadings and did not apply to this case.

The trial proceeded on the theory that we were allegedly reckless and negligent and that our conduct was tortious in character. The only violations we were accused of were violations of certain marine safety orders. (Exh. 18.)

B. PLEADINGS AND ISSUES IN THE RYAN CASE. (BREACH OF CONTRACT AND WARRANTIES.)

We now turn to the decision of the *Ryan* case.

In *Palazzolo v. Pan American SS Corp., et al.,* 111 F. Supp. 505 (D.C.NY) the opinion reveals the following:

"Plaintiff, a longshoreman employed by Ryan Stevedoring Co., Inc., was seriously injured aboard the S.S. Canton Victory when he was struck by a roll of paper pulp during the discharge of the vessel's cargo at Brooklyn, N. Y. *The theory of plaintiff's claim was that the cargo of paper pulp was improperly stowed.* The loading of the cargo at Georgetown, S. C., and the discharge of the cargo at Brooklyn, N. Y., were both performed by plaintiff's employer, Ryan Stevedoring Co., Inc. (hereinafter called Ryan) . . .

"It is Pan-Atlantic's contention that while there can be no contribution between joint tort-feasors . . . (citing cases) . . . those cases are inapplicable for the reason that Pan-Atlantic was not a joint tort-feasor. Pan-Atlantic argues that liability has been visited upon it *solely because of an improper stowage of cargo* which made the ship unseaworthy *and that since Ryan alone created the unseaworthiness* which is essentially a species of liability without fault; Seas Shipping Company v. Sieracki, 328 U.S. 85, 94, 66 S. Ct. 872, 877, 90 L. Ed. 1099, this case comes within the rule of those cases *which imply a contract of indemnity based upon the failure of a party to perform work which it contracted to do.*" (Citing *Burris v. American Chicle,* 2 Cir., 120 F. 2d 218; *Seaboard Stevedoring Corporation v. Sayodohic*

SS Co., 9 Cir., 32 F. 2d 886; *U. S. v. Rochschild International Stevedoring Co.,* 9 Cir., 183 F. 2d 181.)

"In such cases the employer's or indemnitor's negligence is described as being the 'sole', 'active', 'primary' or 'affirmative' cause of the employee's injury. However, if the shipowner is a joint tort-feasor a contract of indemnity is not implied for.

" 'To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise, such an implication would be utterly unreasonable'. *American Mut. Liability Ins. Co. v. Matthews,* supra, 182 F. 2d 324." (Added emphasis ours.)

In the Supreme Court the Court decided the case under the original theory of the action for "breach of contract." As was said by our Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,* 350 U.S. 124, 100 L. Ed. Adv. 148:

"As permitted by §33 of that act, Palazzolo sued the respondent-ship owner in the Supreme Court of New York. He claimed that the unsafe stowage of the cargo, which caused his injuries, established either the unseaworthiness of the ship, or the shipowner's negligence in failing to furnish him with a safe place to work, or both." * * *

(P. 151.) "A like result occurs where a shipowner *sues, for breach of warranty, a supplier of defective ships gear* that has caused injury or death to a longshoreman using it in the course

of his employment. *And a like liability for breach of contract* accrues to a shipowner against a stevedoring contractor in any instance where the latter's improper stowage causes an injury on shipboard to someone other than one of its own employees. * * *"

"The shipowner's action here is not founded upon a tort or upon any duty which the contractor owes to its employee. The third party complaint is grounded upon the contractor's breach of its purely consensual obligations owing to the shipowner to stow the cargo in a reasonably safe manner. Accordingly, the shipowner's *action for indemnity on that basis* is not bound by the compensation act.

2. The other question is whether, in the absence of an express agreement of indemnity, a stevedoring contractor is obligated to reimburse a shipowner for damages caused by the contractor's improper stowage of cargo.

The answer to this is found in the precise ground of the shipowner's action. * * * On the other hand, the shipowner's action for indemnity here is not based merely on the ground that the shipowner and contractor each is responsible in some related degree for the tortious stowage of cargo that caused injury to Palazzolo. *Such an action brought without reliance upon contractual undertakings, would present the bald question whether the stevedoring contractor or the shipowner, because of their respective responsibilities for the unsafe stowage should bear the ultimate burden of the injured longshoreman's judgment.* That

question has been widely discussed elsewhere in terms of the relative responsibility of the parties for the tort, and those discussions have dealt with concepts of primary and secondary or active and passive tortious conduct. *Because respondent in the instant case relies entirely upon petitioner's contractual obligation, we do not meet the question of a noncontractual right of indemnity or of the relation of the compensation to such a right.*" (Added emphasis ours.)

The *Ryan* case is, we respectfully state, not authority for the issue of comparison of active versus passive negligence between two alleged joint tortfeasors, as were the issues in the case at bar. In fact, the case at bar was tried upon the very concepts of active versus passive negligence that our Supreme Court well recognizes poses different issues and was a matter entirely and solely elected by the plaintiff when it filed its action.

C. COMPARISON OF PLEADINGS AND ISSUES.

The Ryan case.

As pointed out the entire action from its inception in the State Court until its determination in the United States Supreme Court was based on the theory of breach of contract and warranties. Even the action of the injured stevedore, Palazzolo, against the shipowner proceeded on the theory of improper stowage. (See our discussion of the case, supra,

vhere we quote from the first opinion 111 F. Supp. 05.) The ship filed a third party complaint on the heory of breach of contract. In the *Ryan* case no lefective beams entirely devoid of locking devices vere supplied by the vessel. There is some discussion f chocks and wedges but nothing was at issue as to he failure of the ship knowingly supplying a danger- us piece of equipment, a part of the vessel itself, nd then attempting to exculpate itself by comparing ts own negligent and tortious conduct with that of ne stevedoring contractor as to whose negligent con- uct was the more dangerous or was the "sole" active" proximate cause as compared to "passive egligence".

he case at bar.

The injured stevedore, Williams, in his Complaint led in the State Court (Tr. pp. 7-12) charged merican President Lines with negligence in "care- ssly and negligently provided unsafe and improper ading gear and strongbacks" and that said defend- nt "so carelessly and negligently failed to provide roper and adequate or other safety devices for ecuring in place the strongbacks" (Par. IV of omplaint).

A reading of the Complaint will reveal that Amer- an President Lines *was sued for tortious negligence s well as unseaworthiness.*

The action brought by American President Lines gainst Marine Terminals (Tr. 1-12) proceeds *solely* n the theory of negligent and tortious conduct on

the part of Marine Terminals. We quote in part (Par. IV, Tr. 4):

> "Plaintiff herein was unaware, not only prior to but at all times mentioned herein and until said hatchbeams became dislodged, as hereinafter set forth, that said safety latch was missing from said hatchbeam, nor did defendant herein at any time prior to said dislodgment advise plaintiff of said dangerous, unsafe, and unseaworthy condition. (*A condition created by the ship itself.*)
>
> Notwithstanding such knowledge on the part of defendant as aforesaid, *defendant negligently, recklessly, and without regard to the imminent peril to its employees,* commenced cargo operations in said hatch. Shortly thereafter said hatchbeam became dislodged when struck by certain cargo handling equipment * * * and fell into said hatch, striking and severely injuring a stevedore employee of defendant, one Robert Williams * * *"

The Complaint also says (Par. V of Complaint, Tr. 5):

> "Because of the absolute liability of American * * * to said Robert Williams based on the unseaworthiness* of said hatchbeams as aforesaid said action was compromised and settled * * *" (*The words "and negligence" were added by amendment (Tr. 22).

And again (Par. VI of Complaint, Tr. 6):

> "The sole, active, primary and proximate cause of the injures sustained by said Robert Williams was the negligent and reckless action of defend-

> ant Marine Terminals Corporation in proceeding with cargo operations while fully aware of the fact of the missing safety latch as aforesaid, whereby plaintiff herein has been damaged * * * as to which amount it is entitled to be fully indemnified by defendant."

We respectfully submit that the *Ryan* case does not pply to the pleadings, theory or evidence of the case bar, for as your Honors well pointed out in your inion (p. 8)

> "The learned trial judge below did not have the the benefit of the * * * Ryan case, it having been decided subsequently. Hence, the District Court did not proceed on this theory and entered no findings with respect to it."

As your Honors also well said in your opinion in e case at bar (p. 5):

> "Thus, it cannot be said that the only liability of American was for unseaworthiness and the questions raised on this appeal will not be decided on this ground."

And again your Honors on the question of the comarison of the negligence as to being passive and secondry as compared to primary active said (pp. 5-6):

> "In the instant case the Court below found that 'the plaintiffs negligence was passive and that the defendant continued to work with the knowledge of the dangerous condition of the defective strongbacks.'
>
> Under these reviews it would appear that American's being guilty of passive negligence could recover indemnity because of its active and pri-

> mary negligence in permitting the work to continue under the unsafe conditions.
>
> However, if our decision were to be placed upon this ground, there would remain the further question of whether indemnity was barred by the Longshoremen's & Harbor Workers Compensation Act. This question was expressly left open by the Supreme Court in their decision in the Ryan case, 350 U.S. 124, 133, 132 fn 6. Therefore, we prefer not to rest our decision upon this ground."

We wish to reiterate that the defense of compliance with the Compensation Act was specially pleaded by Marine Terminals Corporation. (Tr. 18, Par. V of Answer.)

This question is therefore undecided in the case at bar and would remain so in the event this Honorable Court should make such a determination as was apparently meant to be made in your Honors' opinion on page 11 thereof where you say:

> "The facts found by the court below are in no way inconsistent with our conclusion that the conduct of Marine in performing its operations under knowingly unsafe conditions was the active and primary negligence which proximately caused the accident."

We respectfully state that such conclusion is inconsistent with the theory of the *Ryan* case and that the cases cited by us in our reply brief and *American Mutual Liability Ins. Co. v. Matthews* (2 CA) 182 Fed. 2d 332 are controlling and were not overruled by our Supreme Court in the *Ryan* case.

We also respectfully urge that your Honors' statement and findings that there was a conflict between e findings of fact and conclusions of law of the trial ɔurt (Opinion pp. 10-11) upon which your Honors und that the conclusion of the trial judge (Tr. -36):

> "4. That the concurring negligence of the shipowner went well beyond a mere passive act of negligence based on its non delegable duty to furnish a seaworthy ship and a safe place to work"

ıs in disregard of the rules of interpretation of findgs of facts and findings of probative facts as dissed in our brief (p. 34-36) and under the ruling this Honorable Court in *Winnett v. Helvering,* 68 2d 614 (CCA 9).

Effect of failure to plead a cause of action under rying circumstances has been held to support our ıtention in the following cases:

Indemnity Ins. Co. of North America v. Moses (5 CA) 36 F. 2d 219;

Coates v. United States (8 CA) 181 F. 2d 816;

Shultz v. Manufacturers & Traders Trust Co., DCNY 40 FS 675 (Affirmed 128 F. 2d 889);

Matt J. Ward Co. v. Goeht (2 CA) 230 F. 879.

See also dissenting opinion in *Ryan* case (supra).

D. IF CASE WAS PROPERLY REVERSED A RETRIAL SHOULD HAVE BEEN ORDERED.

If your Honors should still feel that the contract d warranty thereof was properly an issue in the se at bar, we most respectfully state that a trial,

determinations and findings on these issues should be made in a retrial of such issues.

Our Supreme Court in *American Stevedores v. Porello,* 330 U.S. 458, stated as follows:

> "From the record it is not clear whether the District Court made any finding as to the meaning of the contract. We believe its interpretation should be left in the first instance to that court, which shall have the benefit of such evidence as there is upon the intention of the parties. If the District Court interprets the contract not to apply to the facts of this case, the court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law. We therefore affirm the decree of the Circuit Court of Appeals as to Porello. We reverse so much of the decree as awards indemnity to the United States under the contract and remand the case to the District Court for determination of the meaning of the contract."

CONCLUSION.

Accordingly, it is respectfully prayed that a rehearing be granted in the present case for the reasons heretofore stated.

Appellee also respectfully submits that in the alternative and in the event this Honorable Court should reject its contentions in this regard that in all events the mandate of this Court ordering indemnity over should not issue but that the order of this Court should be such as to provide for the admission of

roofs, necessary repleadings, and findings on the sev-
al issues of fact and law that were not considered,
roven, pleaded or considered in the trial of this
tion.

Dated, San Francisco, California,
July 2, 1956.

Respectfully submitted,
BOYD & TAYLOR,
M. K. TAYLOR,
FREDERIC G. NAVE,
Attorneys for Appellee
and Petitioner.

Certificate of Counsel

I hereby certify that I am of counsel for Appellee and Petitioner in the above-entitled cause and that in my judgment the foregoing Petition and Motion are well founded in point of law as well as in fact and that said Petition for a Rehearing and Alternative Motion are not interposed for delay.

Dated, San Francisco, California,
July 2, 1956.

Frederic G. Nave,
Of Counsel for Appellee and Petitioner.